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BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD

STATE OF OKLAHOMA

LOCAL 2171, INTERNATIONAL)
 FIRE FIGHTERS ASSOCIATION,)
)
 Complainant,)
)
 vs.)
)
 THE CITY OF DEL CITY,)
)
 Respondent.)

Case No. #00194

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW,
OPINION AND CEASE AND DESIST ORDER

This matter came on for hearing before the Public Employees Relations Board ("PERB" or "The Board") on October 24, 1989, on the Complainant's unfair labor practice ("ULP") charges. The Complainant appeared by and through its attorney, James R. Moore; and the Respondent appeared by and through its attorneys Ted Pool and Sherry Blankenship. The Board received documentary and testimonial evidence; the Board also solicited and received post hearing submissions (Proposed Findings of Fact, Conclusions of Law and supporting briefs) from both parties, the last of which was received by the board on March 28, 1990.

The Board is required by 75 O.S. 1981, § 312 to rule individually on Findings of Fact submitted by the parties. The submittal of the Complainant is treated as follows:

1. Proposed findings 1, 3, 4, 12, 13, 14, and 15 are substantially adopted by the Board.
2. Proposed Findings 2, 5, 6, 7, 9, 10, and 11 are accepted in part and rejected in part by the Board.

3. Proposed Finding 8 is rejected by the Board as being unnecessary to this decision.

Respondent's submissions are treated as follows:

1. Proposed Findings 1, 2, 3, 4, 6, 7, 13, 14, 15, 16, 23, 24, 26, and 29 are substantially adopted by the Board.
2. Proposed Findings 5 and 28 are adopted in part and rejected in part by the Board.
3. Proposed Findings 8, 9, 10, 11, 12, 17, 18, 19, 20, 25, 27, and 28, are rejected by the Board as unnecessary to a determination of this matter.
4. Proposed Findings 21, 22, 30 and 31 are rejected by the Board.

PROPOSED FINDINGS OF FACT

1. The City of Del City is an Oklahoma municipality existing under a City charter as authorized by the laws of the State of Oklahoma, operating under a council-manager form of government. (Exhibit D)

2. The International Association of Firefighters, Local 2171, AFL, CIO/CLC ("Union" or "Firefighters") is the exclusive bargaining representative for certain employees of the Del City Fire Department.

3. The parties have entered into collective bargaining agreements for approximately the past fifteen (15) years.

4. The Collective Bargaining Agreement at issue in this proceeding was executed for Fiscal Year 1986-87. (Exhibit C, Tr. p. 26, 11. 15-21) which was in effect in August, 1988 when the City

implemented the policy at issue here. (Union Exhibit #3, City Exhibit "U")

5. The City Manager implemented a procedure to investigate accidents involving City employees. The City published the personal injury and vehicle equipment damage investigation procedures in the fall of 1988. (Exhibit A and B)

6. The collective bargaining agreement of the parties provides at Article IV, § 2, as follow:

Section 2. The Employer reserves the right to plan, direct and control all operations not covered by this Agreement, and to hire, promote, demote, discipline, assign, suspend or discharge any employee for just cause and subject to the grievance procedure hereinafter set forth.

In Article IV, § 5, the Agreement provides:

Section 5. Except as may be limited herein, the Employer retains the rights in accordance with the laws of the State of Oklahoma and the responsibilities and duties contained in the Charter of the City of Del City and the ordinance, policies, rules and regulations promulgated thereunder. (Union Exhibit #3)

7. The collective bargaining agreement of the parties provides at Art. VII, § 4, that:

Section 4. All rules, regulations, fiscal procedures, working conditions, departmental practices and manner of conducting the operation and administration of the Fire Department currently in effect on the effective date of this Agreement shall be deemed a part of this Agreement, unless and except as modified or changed by the specific terms of this Agreement. (Union Exhibit #3, p. 6)

8. Prior to August 1988, the Del City Fire Department Policy Manual did not contain any of the procedures found in the new policies. (Tr. pp. 84, 88-90, 92-93, 125-126, 137-138)

9. The two policies in question were issued on or about August 8 or 9, 1988 and were entitled "Vehicles/Equipment Damage" and "Personal Injury." (Union Exhibit #1 and Union Exhibit #2)

10. The new policies were implemented by the City without benefit of any bargaining or an Agreement with the Union. (Tr. pp. 23-24)

11. The new policies created an Accident Review Board and defined the composition of that Board. Employees serving on the Board were to be selected from departments other than that of the employees who were the subject of the Board's action. (Union Exhibits #1 and #2, Tr. pp. 92-93, 137) Under the new policies, the Accident Review Board had the authority to mandate an employee's appearance before the Board, hear evidence of accidents and injury, and recommend disciplinary actions against the employee. (Union Exhibits #1 and #2, Tr. pp. 25-26, 52-53)

12. Following the publication referenced above, Mr. Larry Gooch, President of Local 2171, using Union letterhead stationery, wrote to John Zakariassen, the City Manager, referencing the policies and acknowledging to Mr. Zakariassen that the agreement gives management the right to discipline its employees. However, in that letter, Mr. Gooch also states that "There is nothing within the agreement that contemplates members of the Bargaining Unit being subjected to investigation by ad hoc committees appointed by

your office" and "I would suggest to [his] members that they not participate in this procedure." (Exhibit E, Union Exhibit 4, see also Exhibit G)

13. In response, the City Manager wrote Mr. Gooch on August 15, 1988, explaining that the accident review procedures were established to investigate accidents involving City employees; that Mr. Gooch was taking a "rebellious attitude toward his efforts to establish a risk-management tool; that the review committee was not a disciplinary panel; that disciplinary action could be taken against an employee who refused to comply with a management directive; and that Mr. Gooch's instruction to other employees not to cooperate could subject him to disciplinary action for misconduct. (Union Exhibit #5)

14. The City Manager has both in the past and present, had the right to investigate accidents involving City employees and to discipline employees. (Test. Gooch, p. 37, 11.22-25; p. 38, 11.1-8; p. 40, 11.7-22; p. 59, 11.11-25; p. 60, 11.1-19)

15. The City Manager has historically had the right to request assistance from any of his employees regarding accident investigations, including the Fire Chief, the Chief of Police, or any other employee. (Test. Perkins, p. 126, 11.9-18; p. 126, 11.9-18; Test. (City Man., p. 155, 11.1-9)

16. Discipline historically and currently has been determined and administered by the City Manager after his review of a situation. (Test. Perkins, p.134, 11.10-25; p.135, 11.1-4)

17. Grievance procedures are available to Union members for alleged violations of the Agreement and there has been no change to the grievance procedures established in the Agreement as a result of the accident investigation policy. (Agreement, Exhibit C, Test. Gooch, p. 35, 11.18-24; p. 46, 11.2-4; p. 48, 11.1-25; 11 O.S. § 51-101 et seq.)

18. The new accident review policy created certain new elements not in existence prior to its creation, to-wit:

- a) Existence of the Board
- b) Composition of the Board
- c) Board Procedures
- d) Board Standards of Evidence
- e) Mandatory Appearances before the Board
- f) Board authority to recommend disciplinary action.
- g) Review of the Board's decision (Tr. pp. 84, 88-90, 92-93, 144, 145)

19. Union members are still entitled to Union representation at review hearings if desired. (Test. Perkins, p. 122, 11.1-15; Test. City Man., p. 154, 11.10-17)

20. Participation on the Accident Review Board is voluntary. (Test. Perkins, p. 125, 11.1-8; Test. City Man. p. 154, 11.18-25)

21. After creation of the Board, the City Manager adopted the Board's recommendations, at least in part, for disciplinary action in several instances. (Tr. pp. 138-141)

22. Larry Gooch, the President of IAFF, Local #2171, had a duty to administer the Collective Bargaining Agreement and represent members of the bargaining unit as to all terms and conditions of employment. (Tr. pp. 37, 55-58)

23. Mr. Gooch filed a grievance relative to the new accident review policy but later dropped the grievance. (Exhibit I, J, Tr. p. 35)

24. On August 19, 1988, the subject charge was filed and later amended alleging two violations:

- a. Violation of 11 O.S. § 51-102(6a)(1) as a result of the threat of discipline for Mr. Gooch's action as the Union representative, and
- b. Violation of 11 O.S. § 51-102(6a)(5), failure to bargain the unilateral changes incorporated in the two policies.

25. On August 24, 1988, the City Manager wrote Larry Gooch advising him not to interpret his prior letter of August 15, 1988 as a threat. (City Exhibit "H")

26. Union did not request the item to be bargained after knowledge of its existence. (Test. Perkins, p. 128, 11.3-10; Test. Gooch, p. 53, 11.7-14)

PROPOSED CONCLUSIONS OF LAW

1. The PERB has jurisdiction over the parties and subject matter of this dispute pursuant to 11 O.S. Supp. 1986, § 51-104.

2. Safety rules, disciplinary systems and rules of employee conduct are mandatory topics of bargaining. Gulf Power Company, 156 NLRB 622 (1966); Amoco Chemicals Corporation, 211 NLRB 618 (1974).

3. Rule changes on employee safety and discipline are permissible when a management rights clause evidences a grant of permission by the union to unilaterally effect such changes.

Continental Telephone Co., 274 NLRB 1452 (1985). However the management rights clause in question does not permit unilateral changes. Therefore, absent agreement to arbitrate by the Respondent the unilateral change constitutes an unfair labor practice.

4. Threats and coercive comments which reasonably tend to interfere, intimidate and restrain employees in the exercise of their rights constitute unfair labor practices, Hanes Hosiery Inc., 219 NLRB 338 (1985) 11 O.S. 51-102(6a). The August 15th letter to the union president from the City Manager was violative of 11 O.S. § 51-102(6a) due to the fact that it reasonably tended to intimidate, interfere and restrain the union president in the exercise of his duties.

PROPOSED OPINION

This matter raises two interrelated issues including an alleged unilateral change and the issue of alleged unlawful threats against the Union President. The Board will deal with each issue separately for the purpose of clarity.

1. Unilateral Change

When reading the collective bargaining agreement, two provisions appear to be of particular significance. First, Article IV, § 2, provides that management reserves the right to discipline employees, including discharge for just cause, subject to the grievance procedure set forth in the Agreement. On the other hand, the Agreement provides in Art. VII, § 4 that all rules, working

conditions, manner of conducting the fire department, etc., in effect at the time of execution of the Agreement are deemed part of the collective bargaining agreement.

This action, therefore, might present a case ripe for arbitration. However, the decision and discretion to defer to arbitration rests with this board as it does with the National Labor Relations Board (NLRB). See NLRB v. Thor Power Tool Co., 351 F.2d 584 (CA 7 1965)

The NLRB has declined to defer to arbitration where the union has abandoned the arbitration process, Producers Grain Corp., 169 NLRB 466 (1968) and where arbitration was cancelled after an unfair labor practice charge was filed, Hoerner - Waldorf Paper Products Co., 163 NLRB 772 (1967). Likewise, this Board must balance its statutory duty to prevent unfair labor practices with its desire to promote the use of contractually provided dispute resolution procedures. In this setting the Board declines to defer to arbitration unless the respondent agrees to forego procedural objections and agrees to binding arbitration.

It is well settled that safety rules and rules of employee conduct are mandatory subjects of bargaining, Gulf Power Company, 156 NLRB 622 (1966), Miller Brewing Company 166 NLRB 831 (1967), Murphy Diesel Company, 184 NLRB 757 (1970), as is the institution of a disciplinary system, Amoco Chemicals Corporation 211 NLRB 618 (1974).

However, changes of rules are permissible when a management rights clause evidences a grant of permission by the union to

unilaterally effect such changes. Continental Telephone Co. 274 NLRB 1452 (1985). See also, e.g., United Technologies Corp., 287 N.L.R.B. No. 16 (1987). Unlike Continental Telephone, Supra, the management rights clause here does not reserve the specific right to promulgate rules. The Board is of the opinion that the clause merely allows the City to discipline, assign or discharge an employee for just cause; powers no party hereto disputes. Nor does Art. X of the City Charter provide more rights than those routinely exercised by a City which, again, is undisputed.

The sole issue remaining is whether the City has impermissibly bargained away managerial control in violation of the public policy pronouncements recently announced in Mindemann v. Independent School District No. 6 of Caddo County, 771 P.2d 996 (Okla. 1989). The Board is persuaded that the city has not impermissibly bargained away managerial rights but in fact has retained the right to investigate accidents and to discipline employees as is agreed by all parties.

The provisions of 11 O.S. § 51-101(B) guarantee that all permanent paid employees of the Firefighter Association are accorded all the rights of labor with the exception of the right to strike. The Board is persuaded that the accident investigation rules and discipline related thereto are mandatory topics of bargaining and that unilateral changes thereto amount to an unfair labor practice pursuant to 11 O.S. § 51-102(6)(6a)(5) and a cease and desist order should issue absent the respondent agreeing to waive procedural objections and engaging in binding arbitration.

The Board believes this matter is best determined by an arbitrator, however, absent arbitration, the Board will not ignore its statutory duty to determine the rights of the respective parties. The Board will defer to arbitrator's decision on contractual issues should arbitration actually take place.

2. Threats against the Union President.

Both federal and state law limit actions by employers when dealing with unions. 29 U.S.C. § 158(a)(1) reads:

It shall be an unfair labor practice for an employer,

- (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by § 157 of this title.

11 O.S. § 51-102(6a)(1) prohibits:

- (1) Interfering with, restraining, intimidating or coercing employees in the exercise of the rights guaranteed them by this Article;

The Oklahoma statute is more restrictive on the employer than is the Federal statute by adding intimidation to the equation.

Clearly, Mr. Gooch felt that the creation of the accident review board was impermissible and was exercising his duties as union president. The City Manager by citing Mr. Gooch's "rebellious attitude" and threatening disciplinary action meant to coerce and intimidate Mr. Gooch in the exercise of his duties. The tone and content of the letter can only be interpreted as a threat rather than reasoned discussion of an issue in dispute. The subsequent letter of August 24, 1988, advising Mr. Gooch not to

interpret the August 15, 1988 letter as a threat does nothing to diminish the threatening nature of the August letter. Rather it underscores the fact that the manager may have recognized the threatening nature of his earlier letter.

The test for determining whether any particular statement or action is violative of 11 O.S. § 51-102(6a) was addressed in Fraternal Order of Police Lodge No. 163 v. City of Mustang, PERB Case No. 00136 (1987) wherein the Board stated:

The type of conduct which constitutes coercion under § 51-102(6a)(1) presents an issue of first impression for the PERB. The Oklahoma Supreme Court has expressed its willingness to enlist federal decisional law construing the National Labor Relations Act when interpreting parallel Oklahoma statutes.

See, e.g. Stone v. Johnson, 690 P.2d 459, 462 (Okla. 1984).

The language of 11 O.S. 1986, §§ 51-102(6a)(1) defining interference, intimidation and coercion as an unfair labor practice tracks closely the language of 29 U.S.C. § 185(a)(1).

Under the National Labor Relations Act in particular 29 U.S.C. § 158(a)(1), threats and coercive comments which reasonably tend to interfere with or restrain employees in the exercise of their rights under the Act constitute an unfair labor practice. Hanes Hosiery Inc., 219 NLRB 338 (1975). The test is not whether the attempt to intimidate, interfere or coerce succeeded or failed, but that the conduct was such that it tends to interfere with the free exercise of those rights; DeQueen General Hospital v. NLRB, 744 F.2d 612, 614 (8th Cir. 1984).

Concerning the state of mind of the person who uttered the threat, courts have variously held that the state of mind is irrelevant, NLRB v. Litho Press of San Antonio, 512 F.2d 73, 76 (5th Cir. 1975); that an anti-union motive is a relevant consideration Tri-State Truck

Services, Inc. v. NLRB, 616 F.2d 65, 69 (3rd Cir. 1980) and finally, that some conduct may be so inherently destructive of rights under the NLRA that no proof of anti-union motivation is required Vesuvius Crucible Co. v. NLRB, 668 F.2d 162, 169 (3rd Cir. 1983).

The Board is of the opinion that the appropriate basis for decision in this case is that the state of mind of the person uttering the threat is relevant; on occasion however, the threats may be so inherently destructive that no proof of motivation is required... In any event, the keystone of establishing an unfair labor practice is that the threat tends to interfere with rights protected under the Act. The Board is of the further opinion that the success or failure of the threats to actually intimidate or coerce is not a prerequisite to establishing an unfair labor practice.

The Board concludes that the August 15, 1988, letter was violative of 11 O.S. § 51-102(6a)(1). It is necessary that a Cease and Desist Order should be issued.

PROPOSED CEASE AND DESIST ORDER

1. The City of Del City is hereby ordered, pursuant to 11 O.S. Supp. 1986, § 51-104b(c) and consonant with the findings of fact, conclusions of law and opinion entered herein, to cease and desist from the date of this order hence forward from threatening, intimidating or otherwise coercing complainant or members thereof, from acting in concert, or otherwise exercising their rights under the Act.

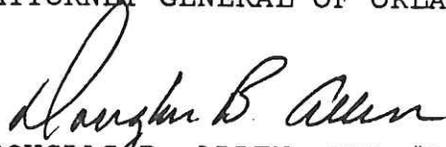
The City is further directed to report to the PERB, within sixty (60) days from the date of this order, the steps it has taken

to prevent a re-occurrence of the conduct found unlawful hereinabove.

2. The City of Del City is hereby ordered, pursuant to 11 O.S. Supp. 1986, § 51-104b(c) and consonant with the findings of fact, conclusions of law and opinion entered herein, to cease and desist from the date of this order hence forward from employing disciplinary procedures not existing at the time of the execution of the most current collective bargaining agreement. The Board stays the effective date of this section (2) of the cease and desist order for thirty (30) days from the date of this order enabling the respondent to agree to binding arbitration in keeping with the opinion herein.

Respectfully submitted,

ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA



DOUGLAS B. ALLEN, OBA #213
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, GENERAL COUNSEL DIVISION

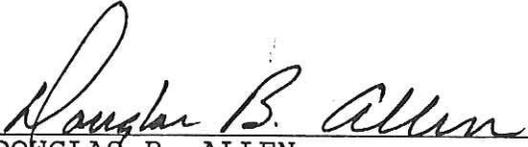
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CERTIFICATE OF MAILING

This is to certify that on the 10th day of July, 1990, true and correct copy of the foregoing Proposed Findings of Fact, Conclusions of Law, Opinion and Cease and Desist Order were mailed, postage prepaid thereon, to:

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